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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 631

CONTINENTAL CASUALTY COMPANY, As Subrogee of ATLANTIC AND GULF STEVEDORES, INCORPORATED,

Petitioner,

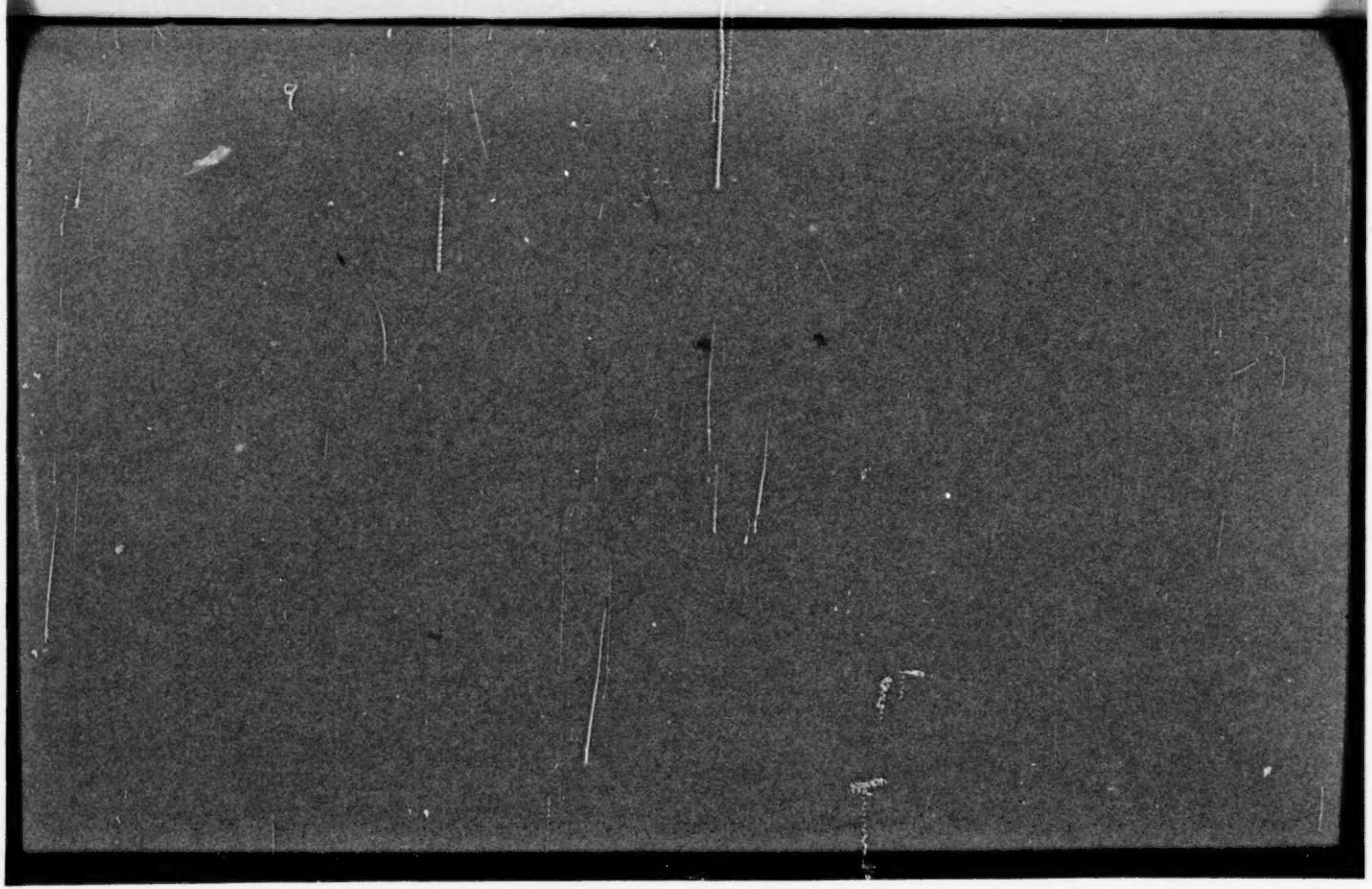
Vs.

STEAMSHIP "BENNY SKOU", IN REM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JETT, SYKES & HOWELL,
FRED E. MARTIN,
Proctors for Petitioner



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STEAMSHIP "BENNY SKOU", IN REM,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I. PRAYER

Petitioner prays that a write of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on December 3, 1952.

II. OPINIONS BELOW.

The opinion of the District Court was reported in 101 Fed. Supp. 15 (R. 18). The opinion of the Court of Appeals for the Fourth Circuit (R. 35) is reported in 200 Fed. (2d) 246.

III. JURISDICTION.

The Judgment of the Court of Appeals for the Fourth Circuit was entered on December 3, 1952, (R. 43) and the jurisdiction of this Court is invoked under Title 28, U. S. C. A. Section 1254 (1).

IV. QUESTIONS PRESENTED.

The question here presented is whether it is mandatory for a United States District Court sitting in admiralty to apply a one year limitation period provided for in the state statute, which creates, in addition to a right to recover for wrongful death in the state Court, an in rem lien against the offending vessel enforceable only in admiralty, where under the facts of the case involved the vessel against which the lien exists absents itself from the jurisdiction of the Court during that one year period.

Stated differently, the question is whether a state which desires its citizens or the survivors of its citizens who might suffer wrongful death aboard a vessel to have the unique benefit of enforcing an in rem lien against the offending vessel in admiralty, can at the same time alter the uniformity of admiralty law by burdening the admiralty court with the land-locked rigidity of a statutory period of limitations in lieu of the admiralty doctrine of laches.

V. STATUTES INVOLVED.

The statutory provisions referred to herein are printed in Appendix A, infra, at pages 12, 13.

VI. STATEMENT.

On September 6, 1947, James Bright, Jr., a stevedore, was killed while in the performance of his duties aboard the Danish vessel "BENNY SKOU", then engaged in loading cargo in the harbor at Norfolk, Virginia. By reason of Bright's death, an admiralty lien was imposed upon the Steamship "BENNY SKOU" and Bright's surviving dependents, a widow and a mother, were given the right to proceed in rem on the admiralty side of the United Sttaes District Court. (Virginia Death By Wrongful Act Statute, Sec. 8-633 of the Code of Virginia of 1950) (Appendix A, Page 12).

On December 10, 1947, said dependents accepted an award pursuant to the provisions of the *Longshoremen and Harbor Workers Act,* Title 33, U. S. C. A. 901, et seq. By reason of the payment of this award Petitioner, Continental Casualty Company, became subrogated to the rights of the estate of the deceased.

On March 4, 1948, the New York agent of the Steamship "BENNY SKOU" was given notice of a claim being made against the "BENNY SKOU" by reason of the death of Bright on September 6, 1947.

The Steamship "BENNY SKOU" sailed from the port of Hampton Roads on September 7, 1947, the day following the death of Bright, and did not return to Virginia until March 20, 1951, upon which date Petitioner filed the instant libel in rem and attached the vessel. (R. 36).

Although the libel to enforce the lien imposed upon the vessel by reason of the death of Bright was brought as soon as the vessel returned to the District, the District Judge dismissed the libel because it was not filed within the one year period prescribed by the Virginia Death By Wrongful Act Statute. (R. 18-22). The Court of Appeals for the Fourth Circuit affirmed the decision of the District Court. (R. 35-42).

VII. SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Fourth Circuit erred:

(1) In holding that it was mandatory for a United States District Court sitting in admiralty to apply the one year period of limitation provided for in a state statute which creates an in rem lien for tortious death occurring aboard a vessel and which lien is enforceable only by a libel in admiralty.

(2) In failing to hold that when the State of Virginia created a right enforceable only in a United States District Court sitting in admiralty that right must be administered in accordance with the principles of admiralty law, which would require the tolling of the limitation period during the absence of the vessel against which an admiralty lien had occured.

(3) In holding that merely because the limitation of one year contained in the Virginia Death By Wrongful Act Statute has been characterized as a substantive limitation, that such characterization would prevent the uniform application of the admiralty doctrine of laches.

(4) In affirming the decree of the District Court.

VIII. REASONS FOR GRANTING WRIT.

A.

The effect of the lower Court opinions in the instant case is to leave without remedy the great numbers of survivors of shoreside maritime workers who are killed while engaged about the inherently hazardous tasks that must be performed while vessels are in port. This Court took cognizance of risks imposed upon such maritime workers as stevedores, ship cleaners, etc., and the benefits of the warranty of seaworthiness was granted to such workers by this Court's opinion in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85.

Of course, upon the death of such a worker his survivors are restricted to the rights of the *Longshoremen and Harbor Workers Act,* Title 33 U. S. C. A. Sec. 901, et seq, as against the worker's shoreside employer, but the Act saves to the employee or his assignee the right to proceed against third party tort feasors. However, when a worker is killed his administrator must look to a state act for a remedy insofar as his third party action is concerned.

The *Virginia Death By Wrongful Act Statute,* Sec. 8-633, Code of Virginia of 1950, (Appendix A, Page 12) bestows upon a survivor the right to proceed in rem in admiralty against the offending vessel and by reason of the statute a lien is imposed upon the vessel on the occurrence of the tortious death of the maritime worker.

In the instant case, as in innumerable other cases, the maritime worker was employed aboard a foreign vessel, the owner of which was a citizen of a foreign country, in this case Denmark. The decedent's survivor could not obtain personal service against a foreign

individual and the only remedy available was to attach the offending vessel and enforce the in rem lien in admiralty which was created by the Virginia Death By Wrongful Act Statute. If, as in the instant case, the lower Court opinions are permitted to remain law and it is held that the one year limitation period commences to run from the date of the death and the right is extinguished if the vessel does not return to the District within that period, more often than not the survivor of the maritime worker will be the possessor of a right without a remedy.

The Court of Appeals for the Fourth Circuit held that the Steamship "BENNY SKOU" sailed from the port of Hampton Roads on September 7, 1947, the date following the death of James Bright, Jr., and did not return to Virginia until March 20, 1951, upon which date Petitioner subrogee filed the instant libel in rem and attached the vessel "BENNY SKOU". (R. 36).

To hold that an in rem right was extinguished under these circumstances by the mere passing of time is not justice and should not be the law.

No other appellate court to the knowledge of the Petitioner has ever passed on this question and this Honorable Court has never had the question squarely presented to it.

In *The Harrisburg,* 119 U. S. 199, this Court noted that no reason had been advanced to explain why almost five years had elapsed between the death and the filing of the in rem libel. This Court, therefore, held at page 214:

> "* * * No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse has been shown."

This Court's opinion in the above cited case indicates that when reasonable excuse for delay in filing a libel has been shown Courts of admiralty should apply the doctrine of laches.

The lower court mistakenly held that the question left open by this Court in *The Harrisburg,* supra, was answered in the case of *Western Fuel Co. v. Garcia,* 257 U. S. 233. That case presented the question of an in personam suit in admiralty where personal service could be had and can in no way have any bearing upon the determination of an in rem suit against the offending vessel as in the instant case, where personal service could not be had because the owner of the "BENNY SKOU" was a foreign citizen.

B.

The lower Court decisions in the instant case destroy the uniformity of admiralty jurisdiction required by the Constitution (Art. 3, Sec. 2). Appendix A, page 13).

This Court has often had occasion to consider the nature and extent of admiralty jurisdiction as it was intended to be conferred by the Constitution. In *The Lottawanna* 21 Wall. 558, 575; 22 L. Ed. 654, 662, Mr. Justice Bradley, speaking for the Court, said:

> "One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution

> aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

The admiralty nature of the lien created by the Virginia Death By Wrongful Act Statute, supra, was recognized by the Court of Appeals for the Fourth Circuit in the case of *The Glendale,* 81 Fed. 633. At page 634 the Court stated:

> "* * * The Virginia statute declares that 'the person who, or the corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or if a ship or vessel, to a libel in rem'. A libel in rem proceeds upon the idea of the existence of a lien. *'Whenever a lien or a claim is given on a thing by the maritime law,'—and as has been seen, the lien created by the local law is administered in admiralty on the same principles as maritime liens*—the admiralty will enforce it by its process in rem, and it is the only court competent to do this. It is much more than a right to sue. It is jus in re, a right in the thing itself, without actual possession or any right of possession and can be executed and devested only by process in rem and is treated as a proprietary right." (Italics Supplied).

The Court in the above cited case holds that the lien created by reason of a tortious death occurring aboard a vessel is to be administered in admiralty on the same principles as maritime liens.

Admiralty jurisprudence has recognized the fact that the nature of a vessel's activities frequently carries it beyond the reach of a lien holder for an extended period of time and, accordingly, created the doctrine of laches in lieu of the land-locked rigidity of a civil

statute of limitation. In *The Key City,* 14 Wall. 653, 660; 20 L. Ed. 896, 898, it was held by this Court that federal courts of admiralty are not governed by state statutes of limitations in the enforcement of maritime liens. This Court stated:

> "That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit (enforcement of an in rem lien) must in every case depend upon the peculiar equitable circumstances of that case." (Parenthetical expression supplied).

The Court of Appeals below approved the language of the District Judge to the effect that "Virginia has bestowed upon admiralty a right to grant recovery not previously possessed by admiralty. The endowment must be taken *cum onere.*" (R. 40). Petitioner submits that the State of Virginia must accept a benefit of admiralty *cum onere.*

If the State of Virginia in its Death By Wrongful Act Statute desired to create a lien against an offending vessel for a death occurring aboard the vessel while within the jurisdiction of the State of Virginia, which lien would be enforceable in admiralty, it could do so, but the enforcement of the lien must be consistent with the general principles and uniform operation of the maritime law.

The decisions are uniform that once admiralty takes jurisdiction, the subject matter must yield to the uniformity required by the admiralty jurisdiction. *Benedict on Admiralty,* 6th Ed., Vol. 1, Page 14, states:

> "* * * In the exercise of their admiralty jurisdiction, the Federal Courts are not bound by State Statutes. State legislation though recognized in

> remedial aspects consistent with the general principles and uniform operation of the maritime law, is not permitted to displace the characteristic features of the maritime law or to impair that uniformity which, in international and interstate relations the Constitution designed to establish in conferring the maritime power upon the United States."

The lower Court's decision in the instant case, which holds that the Virginia Death By Wrongful Act Statute can prescribe a fixed period of limitation for the enforcement of a maritime lien, contradicts its holding in *The Glendale,* supra, to the effect that a lien created by the local law must be administered in admiralty on the same principles as maritime liens, and the decision of this Court in *The Key City,* supra.

C.

The lower courts completely ignored the salient points set out in reasons "A" and "B" above and felt constrained to automatically dismiss this suit on the sole ground that the period of limitation in the Virginia Death by Wrongful Act Statute is substantive and that, therefore, the Court was powerless to toll it. (R. 37). These decisions conflict with the modern view adopted by the Court of Appeals for the Second Circuit in *Osbourne v. U. S.,* 164 Fed. (2d) 767, 768, and the Fourth Circuit's own view in *Scarboro v. Atlantic Coast Line R. R. Co.,* 178 Fed. (2d) 253, 256, Certiorari denied 339 U. S. 919.

The Second Circuit in the *Osbourne* case, supra, and the Fourth Circuit in the case of *Scarboro,* supra, both abandoned antiquated distinctions drawn between substantive and procedural or ordinary statutes of limitations. Both Courts held that the circumstances of the

cases tolled the period of limitation even though they were substantive limitations, that is, limitations which were an integral part of the statute creating the right of action. (R. 39).

The *Osbourne case,* supra, involved tolling the statute of limitations set out in the *Jones Act,* Title 46, U. S. C. A. Sec. 688 and the *Scarboro case,* supra, involved the tolling of the statute of limitations as prescribed by the *Federal Employers' Liability Act,* Title 45, U. S. C. A. Sec. 51, et seq. The vitality of contemporary law will no longer tolerate such a useless distinction. As aptly stated by the Fourth Circuit in the *Scarboro case,* supra:

> "Here the proper approach is not technical and conceptualistic. Rather, we think it should be realistic and humane. The spirit, not the letter, should control. Qui haeret in litteris, haeret in cortice."

IX. CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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February 25, 1953

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APPENDIX A.

Code of Virginia of 1950—Section 8-633:

"Action for death by wrongful act.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured person.

"Every action under this section shall be brought within one year after the death of the injured person, notwithstanding the provisions of § 8-24. (Code 1919, § 5786; 1926, p. 859; 1942, p. 159)."

Article 3, Section 2, Constitution of the United States:

"Section 2. Jurisdiction of Courts.

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which, shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another States;—between Citizens of different States; between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."